No. 18-15

In The Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), should be overruled.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See, e.g.*, *Garco Construction, Inc. v. Speer*, 583 U.S. ___ (2018); *Flytenow v. FAA*, 137 S. Ct. 618 (2017); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

The Beacon Center is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property

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[1] *Amici curiae* notified the parties 10 days before the filing of this brief of their intent and request to file it. All parties consented to the filing of this brief in letters. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

rights and constitutional limits on government mandates are central to its goals.

This case is of particular interest to *amici* because the continued application of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), gives the executive branch opportunities to usurp both judicial and legislative powers that the Constitution does not grant it. Combining that deference with a federal agency's power to "consider . . . its policy on a continuing basis," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005), opens the door to arbitrary and capricious agency actions that will remain unchecked. This case presents the Court with an opportunity to preserve our structure of government and revisit the highly deferential standard set forth in *Seminole Rock/Auer*.

SUMMARY OF ARGUMENT

"The administrative state 'wields vast power and touches almost every aspect of daily life.'" *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010)). "[T]he authority administrative agencies now hold over our economic, social, and political activities[,]" *id.*, stands in stark contrast to the government of enumerated powers the Framers envisioned. Our Founding Fathers sought to create a government structure

limited in nature. Addressing concerns that the proposed national government would usurp the People's power to govern themselves, James Madison explained: "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961). Today's wide-reaching "'administrative state with its reams of regulations would leave [the Founders] rubbing their eyes.'" *City of Arlington*, 133 S. Ct. at 1878 (quoting *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting)). "It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed." *Id.* at 1879 (citation and quotation omitted).

This case involves one such example of the executive branch's overreach and disregard for our carefully crafted government structure, but there are many thousands of other examples. The government action at issue is emblematic of a systemic problem in a government that no longer imposes meaningful checks on executive action. This case provides an opportunity to address doubts raised by several members of this Court about the continued validity of *Seminole Rock/Auer*. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199 (2015); *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50 (2011) (Scalia, J., concurring).

Amici maintain that any deference afforded to a federal agency must be consistent with the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq*. Deference to an agency's interpretation of its own ambiguous regulation offends the separation of powers principles embedded in our Constitution because it enables agencies to circumvent the APA's notice-and-comment procedures. As applied here, *Seminole Rock/Auer* deference gives Veterans Affairs license to issue arbitrary and capricious interpretations of its own regulations that carry the force of law. *Amici* therefore join Petitioner in asking this Court to reconsider *Seminole Rock/Auer* deference.

ARGUMENT

I. *Seminole Rock/Auer* deference provides federal agencies with a vehicle to adjudicate their own ambiguous regulations.

There are now "over 430 departments, agencies, and sub-agencies in the federal government." *Hearing on "Examining the Federal Regulatory System to Improve Accountability, Transparency and Integrity" Before the Senate Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Senator Grassley) ("*Examining the Federal Regulatory System*"). As federal agencies grow in number, so does the size of the Federal Register. For example, the Federal Register grew from 4,369 pages in 1993, to 49,813 pages in 2003, to 81,883 pages

in 2012[2] – an increase of nearly 2,000% in just 19 years. And from 2013 to 2014, "the federal bureaucracy finalized over 7,000 regulations." *Examining the Federal Regulatory System*. When one compares those 7,000 regulations to the 300 statutes enacted by Congress during those same years, the growing power of the federal bureaucracy is undeniable. *Id.*

The number of official regulations tells only part of the story. As this Court is well aware, federal agencies issue, interpret, and enforce the rules that govern our lives. "[A]s a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to have violated their rules." *City of Arlington*, 133 S. Ct. at 1877-78 (Roberts, C.J., dissenting). The authority agencies have accumulated is startling.

Not only do agencies' exercises of legislative authority go unchecked,[3] their regulatory interpretations often receive judicial deference under *Seminole*

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[2] Karen Kerrigan & Ray Keating, *Regulation and the 'Fourth Branch of Government,'* at 1 (2014), http://centerforregulatorysolutions.org/wp-content/uploads/2014/04/FourthBranchWhitePaper.pdf.

[3] Courts have rarely used the delegation doctrine to discipline Congress, or by extension, to rein in federal agencies. "Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions." Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 315 (2000).

Rock/Auer. This deference violates the APA because it allows federal agencies to side-step notice-and-comment procedures, and ignores the Constitution because it is inconsistent with separation of powers principles. These issues grow in importance with every page added to the Federal Register.

The time has come to abandon *Seminole Rock/Auer* deference and this case provides the vehicle to do so. Several members of this Court have pointed out the flaws with affording agencies this deference, suggesting the Court revisit it. As Justice Scalia explained, jettisoning *Seminole Rock/Auer* would leave "[t]he agency . . . free to interpret its own regulations with or without notice and comment; but *courts will decide* – with no deference to the agency – whether that interpretation is correct." *Perez*, 135 S. Ct. at 1213 (Scalia, J., concurring in the judgment) (emphasis added).

II. This Court should reconsider the *Seminole Rock/Auer*-sanctioned practice of ceding judicial power to administrative agencies.

A. *Seminole Rock/Auer* deference is inconsistent with separation of powers principles.

As Justice Scalia noted, *Seminole Rock/Auer* deference is "contrary to [the] fundamental principles of separation of powers." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). The Constitution contemplates that each branch of government will jealously guard its own prerogatives, thus protecting individual liberty. With

Seminole Rock/Auer deference, the judiciary leaves the field resulting in the removal of an indispensable check on federal agency activities.

The rise of the administrative state may have tested the limits of the Constitution's separation of powers, but it does not change the judiciary's duty to "say what the law is." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The APA therefore instructs all reviewing courts to decide "all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action . . . and set aside agency action . . . found to be . . . arbitrary, capricious, or . . . without observance of procedure required by law. . . ." 5 U.S.C. § 706.

Even so, *Seminole Rock/Auer* deference creates separation of powers issues by giving federal agencies, not the judiciary, the primary role in determining the meaning of ambiguous regulations. *See Seminole Rock*, 325 U.S. at 414; *Auer*, 519 U.S. at 461-62. It is "contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well." *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring). Thus, *Seminole Rock/Auer* deference directly contradicts the Constitution when it hands the judicial role of interpretation to a federal agency that itself has promulgated an ambiguous regulation.

B. *Seminole Rock/Auer* deference deprives Congress and the People the benefits of the APA's notice-and-comment procedures.

Congress recognized the hazard that agencies pose to the democratic process and liberty. For over 20 years, "a succession of bills offering various remedies appeared in Congress," *Wong Yang Sung v. McGrath*, 339 U.S. 33, 38 (1950), leading to the APA. The law was then, and is today, "a 'working compromise, in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguards.'" *FCC v. Fox Television Stations*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (quoting Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1248 (1982)).

The APA's chief procedural safeguard, Section 553, requires administrative agencies to provide "notice of proposed rule making" and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. §§ 553(b)-(c). Congress understood that if agencies were going to wield legislative power, their procedures must "giv[e] adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses." S. Doc. No. 77-8, Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, at 102 (1941). Public

notice-and-comment is "essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests." *Id.* at 103.

In notice-and-comment procedures, Congress sought to hold agency heads accountable to both Congress and the public. Congress also sought to foster predictability and stability in the administrative arena and to establish a baseline against which the courts could measure future agency action. *Seminole Rock/Auer* deference effectively exempts agencies from the APA's notice-and-comment requirements. This exemption undermines Congress' objectives and leaves agencies free to promulgate ambiguous regulations and later interpret them, all the while knowing that their interpretation will never be subject to judicial review. *See Decker*, 133 S. Ct. at 1341 (Scalia, J., dissenting in relevant part) (internal quotation marks omitted) ("Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a flexibility that will enable clarification with retroactive effect."). It leaves them free "to control the extent of [their] notice-and-comment-free domain." *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment). And it provides them the opportunity "[t]o expand this domain, . . . [by] writ[ing] substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment." *Id.*

Rather than help secure consent of the governed, *Seminole Rock/Auer* deference relieves an agency of

the burden of the "imprecision that it has produced." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 617 (1996). The burden instead falls on the regulated community. Because of *Seminole Rock/Auer*, there is no incentive for "an agency [to] give clear notice of its policies either to those who participate in the rulemaking process prescribed by the APA or to the regulated public." *Id.*; *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting) (noting that *Auer* deference undermines the objective of providing regulations that are "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law").

Legal regimes are more likely to endure if aggrieved parties believe that they had an adequate opportunity to voice objections and that the disappointing result was the product of a fair fight. Popular acceptance of agency rules depends on the "legitimacy that comes with following the APA-mandated procedures for creating binding legal obligations." *Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 268 (D.D.C. 2015).

Agency actions that proceed without notice-and-comment, like they do here, put the regulated community at risk. If an agency advances an interpretation of its regulations that requires the regulated community to take, or refrain from taking, a particular action, that interpretation becomes de facto – if not de jure – law on the matter, regardless of the form the

interpretation takes. The regulated community must either conform to the interpretation or risk an enforcement action, administrative or judicial, based on alleged non-compliance.[4] As Justice Scalia explained:

> [I]f an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.

Perez, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

The Veterans Affairs' interpretation is but one example of how federal agencies disregard the APA when they interpret their own regulations. And the Federal Circuit's reliance on *Auer* allows agencies to continuously change their interpretation of their own regulations with the force of law. This opens the door to the type of abuse Congress sought to prevent with the APA. Until this Court demands that the executive branch abide by the APA, federal agencies will continue their unconstitutional usurpation of power.

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[4] *See generally* NFIB Small Business Legal Center, *The Fourth Branch & Underground Regulations* (2015), http://www.nfib.com/pdfs/fourth-branch-underground-regulations-nfib.pdf.

C. Members of this Court have expressed doubts about *Seminole Rock/Auer* deference.

This case presents the Court with the opportunity to reconsider the continued application of *Seminole Rock/Auer* deference.[5] This is an issue that various Justices of this Court have said should be reexamined. The Court's 2015 decision in *Perez* underscores the need for clarification about what – if any – deference courts owe to an agency's interpretation of its own regulations.

Writing for the majority, Justice Sotomayor explained that rules issued through the notice-and-comment process are called "legislative rules" because they have the "force and effect of law." *Perez*, 135 S. Ct. at 1203-04 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)). The plain implication is that rules pronounced outside the notice-and-comment process are entitled to little or no deference.[6] This line of

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[5] Unlike the Army's policy decision in *Garco Construction, Inc. v. Speer*, 583 U.S. ___ (2018), courts do not afford the Veterans Affairs' policy decisions the same "substantial deference" afforded to true military matters of policy. *See id.* (Thomas, J., dissental).

[6] This makes sense because underlying *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). But, in vesting agencies with authority to fill in ambiguous gaps, Congress essentially vests agencies with a limited legislative authority – which they may exercise only through the

analysis necessarily questions the judicial practice of deferring to rules pronounced through agency letters or other guidance materials, since they are developed with no transparency, opportunity for public input, or even basic assurances that the agency has thoroughly considered policy implications and alternatives.

Justices Alito, Thomas, and Scalia were more direct – each explicitly argued that it was time to reconsider the continued viability of *Seminole Rock/Auer*. Justice Alito observed that there is "an understandable concern about the aggrandizement of the power of administrative agencies" that stems, in part, from "this Court's cases holding that courts must ordinarily defer to an agency's interpretation of its own ambiguous regulations." *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment). He continued: "I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 1210-11. Similarly, Justice Thomas concluded: "By my best lights, the entire line of precedent beginning with *Seminole Rock* raises serious constitutional questions and should be reconsidered in an appropriate case." *Id.* at 1225 (Thomas, J., concurring in the judgment). And Justice Scalia stated that he would "restore the balance originally struck by the [Administrative Procedure Act] . . . by abandoning *Auer* and applying the Act

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notice-and-comment process – precisely because in exercising that authority, the agency is making rules that carry the force of law. *See United States v. Mead*, 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure. . . .").

as written." *Id.* at 1213 (Scalia, J., concurring in the judgment). *Cf. Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (noting that the Supreme Court's decisions on agency deference "permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design").

Even before *Perez*, Justice Scalia expressed doubts about the validity of *Auer*. In his concurring opinion in *Talk America* he noted that he had "become increasingly doubtful of [*Auer*'s] validity[.]" 564 U.S. at 68 (Scalia, J., concurring). As a result, he was "comfort[ed] to know that [he] would reach the Court's result even without *Auer*." *Id.*

In *Decker*, members of the Court openly acknowledged that, under the right circumstances, it might be time to reconsider *Seminole Rock/Auer*. In his concurring opinion, Chief Justice Roberts, joined by Justice Alito, wrote that *Seminole Rock* (and, by inference, *Auer*) raises an issue that is "a basic one going to the heart of administrative law. Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases. . . . I would await a case in which the issue is properly raised and argued." 133 S. Ct. at 1339.

Even beyond express calls to reconsider *Seminole Rock/Auer*, the limitations to its applicability reveal

the Court's struggles with it. For example, in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), the Court found application of *Auer* deference inappropriate where an agency's interpretation is "plainly erroneous or inconsistent with the regulation" or where there are grounds to believe that an interpretation "does not reflect the agency's fair and considered judgment of the matter in question." *Id.* at 2166 (internal quotation marks omitted).

The deficiencies and harms of *Seminole Rock/Auer* deference are most evident here. As Petitioner explains, the Federal Circuit accepted the Veterans Affairs' interpretation because of *Auer*, not because of any independent finding or analysis of its own about the regulation at issue. The Federal Circuit's recognition that courts review application of *Seminole Rock/Auer* de novo, makes its rubber stamping of the Board's interpretation even worse. This case also presents the classic case of agency aggrandizement of power and the abuses that result when an agency knows that all it has to do to get a court to defer to its desired regulatory interpretation is to promulgate an ambiguous regulation at the start.

Simply stated, *Seminole Rock/Auer* deference allows lower courts to "rubber stamp" potentially defective decisions. Because such blind deference contradicts our Constitution and the APA, *amici* ask this Court to reconsider its continued validity.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amici curiae* brief, this Court should grant the petition for writ of certiorari and reverse the judgment of the Federal Court.

Respectfully submitted,

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